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**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 10 March, 2016

Petition No.180 of 2015

Aircel Ltd.

...Petitioner

Vs.

Union of India

...Respondent

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE DR. KULDIP SINGH, MEMBER
HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER**

For Petitioner

: Mr. Meet Malhotra, Sr. Advocate
Mr. Harsh Kaushik, Advocate
Mr. Abhay Chattopadhyay, Advocate
Mr. Ravi S.S. Chauhan, Advocate
Ms. Pallak Singh, Advocate

For Respondent

: Mr. S.S. Shamsery, Advocate
Mr. Vikas Malik, Advocate

ORDER

By Aftab Alam, Chairperson – The petitioner, Aircel Ltd. is a telecom service provider under a Cellular Telecom Mobile Services (CMTS) licence granted by the Central Government under section 4 of the Indian Telegraph Act, 1885. It has filed this petition challenging the demand notice of penalty dated 23.03.2015 for breach of guidelines prescribed by the department of

telecommunications (DoT) for verification of Customer Application Forms (CAFs) before activation of the SIM cards. The penalties are in respect of special audits conducted in April 2007, August 2014 relating to CAFs from the petitioner's customer data base for the month of July 2014 and October 2014 relating to CAFs from the customer data base for the month of September 2014. The total penalty under the demand notice is of Rs.2,69,27,000/-, the break-up of which is as under:

April 2007	Rs.2,32,000/-
August 2014	Rs.1,06,72,000/-
October 2014	Rs.1,60,23,000/-

The petitioner has paid the penalty demanded for April 2007 in full; the payment was made initially under protest but in course of hearing, the petition was not pressed against the penalty relating to the aforesaid month.

In regard to the penalties relating to CAFs for the months of July and September 2014, the petitioner challenges not only the imposition of the penalty on merits but also the quantification of the penalty amounts. The departmental authorities have determined the amount of penalty on the basis of the ratio between the number of CAFs in the sample and the number of CAFs that were held to be non-compliant. According to the petitioner, applying the Tribunal's decision in the case of RCOM (Petition No.272 of 2013), the penalty amount should be determined by taking the ratio between the number of allegedly non-

compliant CAFs and the total number of the petitioner's subscribers in those two months. Thus calculated, the rate of penalty for each non-compliant CAF would be Rs.10,000/-. Accordingly, on its own calculation the petitioner deposited Rs.2,68,000/- for the alleged non-compliant CAFs from August 2014 and Rs.4,91,000/- for the alleged non-compliant CAFs from October 2014.

At the time of admission of the Petition, however, the petitioner was directed to deposit 25% of the demands for each of the two months.

The facts of case are brief and simple and may be stated thus.

In regard to the petitioner's CAF, special audits were held in August and October 2014. In August 2014, the DDG, TERM Cell, Tamil Nadu asked for 300 specified CAFs from the customer data base of the petitioner for July 2014. The CAFs were asked for on the basis of inputs received in the office. Out of those 300 CAFs, 268 were found to be non-compliant. Out of the 268 CAFs, 235 were held to be "apparently forged" and the other 33 were held to suffer from other defects.

In the October 2014 audit, 356 specified CAFs were asked for from the petitioner's customer data base for September 2014. All the 356 CAFs were held to be non-compliant.

On verification of the CAFs, a show cause notice was issued to the petitioner vide Email dated 08.10.2014. The email enclosed a tabular chart

giving the status of the 368 CAFs from the July 2014 data base that were found to be “apparently forged”. The chart has columns from (a) to (h) under which different parameters are represented in the binary of 0 and 1, with the “0” indicating “not okay” and “1” indicating “okay”. From the chart it is impossible to realise the nature of the defect or as to why a particular parameter in the CAF was found non-compliant.

The petitioner gave its reply by letter dated 10.10.2014 in which it clearly stated that it had faithfully followed the departmental guidelines at every step and in every respect in each of the CAFs and if there was any forgery, it could not be held responsible for it. It was further stated on its behalf that some of the connections relating to those CAFs were earlier disconnected and that on coming to learn from the departmental authorities that the CAFs were forged, it had disconnected all the connections given against those CAFs and had also instituted a police case as it was required to do under the departmental instructions.

In paragraph B of its reply, the petitioner stated as under:

“B. DoT instructions dated 8.2.2010 – No penalty on operators if verification process followed:

We also wish to state clearly that we neither have the access nor do we have the expertise to verify whether the original of the documents being submitted to us as Proof of Identity and Address, are genuine or not. With all documents being available and certifications being given by Point of Sales/Retailers, in all more probably likelihood, the original documents presented during enrolment could be non-genuine. Further, we have gone ahead and filed complaint with

relevant Police Authority as well (copy enclosed), in line with the DoT's Instructions dated 8.2.2010. We strongly state that DoT's verification process has been duly fulfilled and there is no process lapse at Aircel's end.

Therefore, for the reason stated above there is no process lapse in these instances and as such, no penalty ought to be imposed on these cases. In interest of transparency and the audit being a joint audit, we request that in light of DoT's instructions dated 8.2.2010, we be provided with the details as to which step of the verification process is missing and a reasonable opportunity to give response specifically to your observation, before any decision is taken to impose any penalty related to these cases."

The petitioner's show cause was rejected by order dated 10.11.2014 passed by the Director, TERM Cell, Tamil Nadu. The relevant observations and findings in the order are contained in paragraphs 8 and 9 which are as under:

"8. AND WHEREAS it is observed from the subscriber verification reports for Tamil Nadu Service area and M/s. Aircel Ltd. has failed to comply the essential requirement of subscriber verification like photo on CAF, I.D. proof, address proof and database entry in **235** cases and non-submissions **33** cases. The total numbers of violations are **268**. The percentage of correct verification of M/s Aircel Limited for Tamilnadu Service area has been ascertained and an amount of **Rs.1,09,40,000/- (Rupees One Crore Nine Lakhs and Forty Thousands only)** has been calculated as financial penalty to be paid by M/s AIRCEL as per the letter No.800-52/2008-VAS-III(Pt.) dated 24th December 2008 and No.800-09/20010-VAS dated 09th August 2012 for the unverified cases. The details are enclosed as 'Annexure-II' and 'Annexure-III'.

9. AND WHEREAS it is clear from the report that proper verification has not been carried out by the Service provider at the time of provisioning of service to the subscriber and that M/s Aircel Ltd. has violated the terms and conditions of License Agreement and the instructions issued time to time by licensor on the subject by providing mobile connection without proper verification."

From the order of the Director it is clear that in case of the 235 CAFs that were found to be "apparently forged", it is held that the petitioner "failed to comply the essential requirement of subscriber verification like photo on CAF, ID proof and address proof". Therefore, the simple question that arises for

consideration is whether in the facts and circumstances of the case, it can be reasonably said that the alleged forgeries in the CAFs were committed in collusion or complicity with or within the knowledge of the person at the Point of Sale and the responsibility of the forgeries is, therefore, vicariously attributable to the petitioner.

Along with the counter affidavit filed on behalf of the DoT, two sets comprising two CAFs each are enclosed as Annexures R5 and R6. Mr. Shamsbery, counsel appearing on behalf of the DoT invited our attention to these two sets of CAFs. Mr. Shamsbery submitted that in the first set (Annexure R5), there are two CAFs each in the names of Senthil son of Jayaram. According to him, the photographs on the two CAFs are also of the same person and give the same address. Further, in both CAFs, Voter ID card is enclosed as the proof of PoI and PoA but in one case the Voter ID card number is FJT 0209855 and in the other FJT 0902825. According to him, it was evident that the same person had used a forged proof of PoI and PoA in the two CAFs submitted by him.

In the other set (Annexure R6), the same photograph is used in two CAFs. In the first CAF, the name of the customer is shown as Renukamma, with the name of the husband as Chandarappa and in the other the name of the customer is shown as Malliga K. and the name of the husband as Kumaraval. In

both CAFs again the Voter ID card is used as POI and PoA with different numbers though bearing the photographs of the same person.

In regard to these annexures, the relevant averments in the counter affidavit are contained in paragraphs 25 and 26, which are as under:

“25. That in order to analysis the database of the Petitioner, random CAFs of different serial number were chosen as sampling parameters. From the two CAFs of serial no.229 and 230, it was observed that the name and address of the persons in the CAF are the same, POI/POA is same but the photos of the person in CAF are different. In the POA/POI which is the EPIC the original one issued by Election Commission of India has the No. as FJT09002825 whereas the proof provided by the subscriber for getting the mobile connection for serial no.229 is FJT0209855 and for serial no.230 is FJT0906286. In both the two cases photos have been changed and the EPIC no. has been tampered. Moreover, in both the cases the Point of Sale (“POS”) is Kavitha Mobiles, Kanur Pudhur, Tiruppur and Madhu Agnecies, 715, Paraiyar Street, Ellapalayam, Coimbatore is the distributor.

26. That from the two CAF of serial No.68 and 317, it was observed that the photos are same, however, the name of the persons are different, Point of Identity/Point of Address (“POI/POA”) have different serial numbers with the same photo but different addresses which is ample proof for forgery. In these cases, both the retailer as well as distributors are different.”

We have gone through the two sets of CAFs very carefully. Since those are annexed by way of sample, we also assume that those are the best specimen in support of the case of the department. As the annexures are photocopies of the originals, we find it difficult to make any comment on the basis of the photographs as to whether it is the same person, Senthil son of Jayaram whose photograph is affixed on both the CAFs. As regard the address, in the first CAF the address is given as 16, Langarkana Road and in the other it is 16-3/160, Langarkana Road. We are also unable to comment whether the two are the

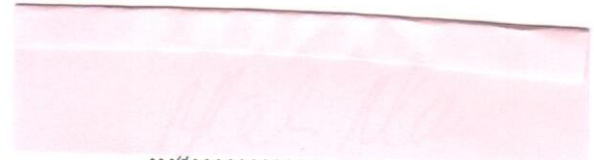
same or different addresses. What however needs to be noticed is that the first CAF is dated 17.07.2015 and the other 26.07.2014. Thus, there was a gap of 10 days in the submission of the two CAFs before the PoS and it cannot even be assumed that both were serviced by the same person at the PoS. In the other set the first CAF bears the date 20.11.2013 and the other 25.09.2013. It is also evident, and it is also admitted in paragraph 26 of the counter affidavit that the two CAFs were submitted at two different POSs. In those circumstances it would be quite unreasonable to hold that the PoS were in any kind of involvement even in case the CAFs were based on forged documents. We are thus clear that the petitioner cannot be held liable for penalty in respect of 237 CAFs from July database and 359 CAFs from September database that were held to be "apparently forged".

As regards the 33 CAFs that were held to suffer from other defects or the quantification of the amount of penalty in regard to those CAFs, we need not go into the question in view of a recent decision of the Tripura High Court, in W.P.(C) No.422 of 2012 that takes away the very right of the DoT to impose any penalty on the licence holders for any infraction of any conditions of the licence.

In the result, the petition is allowed. The impugned demand of penalty dated 23.03.2015 and the order of the Director, TERM Cell, Tamil Nadu dated

10.11.2014 are set aside. The petitioner is held entitled to refund/adjustment of the payments made by it in pursuance of the demand and in terms of the interim direction of the Tribunal.

There will be no order as to costs.



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(Aftab Alam)
Chairperson



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(Kuldip Singh)
Member



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(B.B. Srivastava)
Member

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